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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

PETITION FOR RECONSIDERATION

InterMedia Partners ("InterMedia"), by its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby submits this petition for reconsideration of the Federal Communications Commission's ("FCC" or "Commission") Report & Order, FCC 93-117, MM Docket No. 92-266, released May 3, 1993. InterMedia is a party to this proceeding, filing both initial and reply comments.

I. Introduction

InterMedia owns and operates cable systems throughout the United States, and is directly affected by the regulations adopted by the FCC in the above-referenced Report & Order. InterMedia is seeking limited reconsideration on two issues: (1) that possessory interest taxes, such as those imposed by the State of California, are "external costs" and may be passed through to subscribers in cable television services rates; and (2) that copyright royalty fees are external, government imposed assessments which also may be passed through to subscribers

II. Possessory Interest Taxes

A. Possessory Interest Taxes Are Beyond the Control of the Operator And Are External Costs

The Report & Order makes a distinction between costs which are within the control of the operator, and those costs which are not. Id. at ¶ 254. "External costs," i.e., those beyond the control of the operator, may be excluded from the price cap and passed through to subscribers. Id. InterMedia submits that possessory interest taxes should be viewed as "external costs" for ratemaking purposes.

In its Reply Comments in this proceeding, InterMedia argued that California's possessory interest tax[1] constitutes a "government assessment on cable television services" and as such should be itemized on subscribers' bills as a cost pass-through pursuant to Section 622(C) of the Act.[2] In response, the FCC stated:

> A special tax imposed on rights-of-way, also applicable to other utilities, over and above a franchise fee assessed under a franchise agreement, would not be part of a franchise fee itemized pursuant to the definition in Section 622(g). Thus, we disagree with InterMedia that the California possessory interest tax may be itemized under Section 622(c).

suggesting that possessory interest taxes are "franchise fees" and thus fall within the 5% statutory cap. Rather, InterMedia asserts that possessory interest taxes are costs akin to franchise fees which are outside of the operator's control. Therefore, they should not be included within the benchmark rate.

While itemization is intuitively an appropriate vehicle be properly itemized within the Commission's benchmark would appear to defeat the purpose of this amendment.

With respect to the "government assessments and taxes" defined in Section 622(c)(3), the Commission stated that such costs will be accounted for by the GNP-PI adjustment. Id. at ¶ 254. The GNP-PI alone cannot account for these costs. First, possessory interest taxes are not in the basket of goods and services measured by the GNP-PI. Second, even if such taxes were included in the GNP-PI, not all states impose comparable possessory interest taxes, and an averaged, national GNP-PI would not adequately compensate for them. Third, as discussed further below, the manner in which certain assessors calculate the possessory interest tax often results in exceedingly high assessments which the GNP-PI does not and cannot begin to adequately cover.[3]

Most importantly, however, the costs attributable to the possessory interest tax were not accounted for in the Commission's September 1992 cable rate survey, upon which the benchmark tables are based. Thus, the present benchmark does not compensate operators subject to the tax. Even if the survey had solicited such information, the benchmark scheme, based on national averages, would still will not adequately compensate InterMedia for the extremely high taxes it pays, for example, in

[3] The possessory interest taxes levied in California range from .4¢ to $4.00 per subscriber. See, Reply Comments of the California Cable Television Association, Docket No. 92-266, February 11, 1993, at p. 3.

California. In Alameda County, California, InterMedia passes through to subscribers 60% of its possessory interest tax, which now amounts to $1.67 per month per subscriber. The remaining 40% of these taxes are absorbed by the company. Inclusion of the possessory interest tax in the benchmark rate is enough to place InterMedia's rate in Alameda County over the benchmark and require InterMedia to submit a cost-of-service showing. InterMedia submits that the failure to recognize possessory interest taxes as external costs will force a significant number of California cable operators into cost-of-service regulation. It would be a tremendous waste of both the Commission's and local franchise authorities' resources to review cost-of-service showings for the sole purpose of breaking out costs for possessory interest taxes, which, presumably, will be passed on to subscribers in any event.[4] The possessory interest tax is an easily verifiable direct cost placed on cable television systems, which InterMedia now separately itemizes on subscribers' bills.

B. The Possessory Interest Tax is a Tax on the Transaction Between the Operator and the Subscriber

InterMedia submits that the possessory interest tax is a transactional tax and should be treated in the same manner as franchise fees, namely, external to the benchmark rate.

The tax is a transactional one because of the manner in which assessors value the possessory interest. Assessors using a

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[4] See, e.g., 47 C.F.R. § 32.7240.

"unitary" approach, often include the value of non-taxable intangibles in calculating the possessory interest tax. Such intangibles include existing franchises, subscriber lists, marketing and programming contracts, in-place workforce, going concern value, and goodwill.[5]

Because a major component included in the valuation method described above is the operator's subscriber base, the possessory interest is not based on the value of the right-of-way itself, but rather on the profitability of the system, derived from the transactions between operator and subscribers. The effect of this valuation approach results in possessory interest taxes ranging between 10% to 25% of the cable operator's gross receipts. This tax is effectively a tax on operator/subscriber transactions, and should be itemized and passed through to consumers.

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[5] In two recent cases, California courts have rejected county assessors' valuation methods which included values for non-taxable intangibles. See, Emil Shubat v. Sutter County Assessment Appeals Board, Super.Ct.No. 40970 (3rd App. Dist.), issued February 24, 1993; County of Orange v. Orange County Assessment Appeals Board, Super.Ct.No. 648275 (4th App.Dist., 3rd Div.), issued February 18, 1993. In Shubat, supra, the county assessor attributed $21.7 million of the total $37.9 million assessment solely to the value of the system's possessory interest tax, which was determined to include assigned values for subscriber lists, going concern, etc. After litigating the issue, the Appeals Board reduced the assessment to approximately $6 million after eliminating the value for non-taxable intangibles.

C. The Possessory Interest Tax is Discriminatory to Cable Operators

California's possessory interest tax, primarily because of the local assessor valuation methods discussed above, is applied disproportionately to cable systems and places on cable systems enormous tax burdens which are not placed on other businesses subject to the tax.[6] For businesses other than cable television assessed at the local level, the possessory interest tax is limited to the fair market rent for the exclusive use of the right-of-way on a square foot basis. Thus, assessments of other local business exclude the value of intangibles such as goodwill, advertising, etc. Contrary to the Commission's assertion that the possessory interest tax is no different than other generally applicable property taxes, InterMedia respectfully submits that the mere fact that the possessory interest tax is imposed on other businesses is not dispositive of the issue. It is the effect of the tax on cable television that the Commission must consider. A possessory interest tax of this magnitude must be external to the benchmark rate, along with franchise fees and PEG costs.

III. Copyright

There can be no question that copyright payments are government-imposed levies and are beyond the ability of cable

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[6] Telephone companies in California are exempt by statute from all possessory interest taxes. The possessory interest tax for all other utilities in California are assessed by the State Board of Equalization using the "unitary" approach, discussed earlier.

operators to control. The compulsory copyright license requires cable operators to file semi-annual statements of accounts and make payments with the Copyright Office. 17 U.S.C. § 111. The failure to do so subjects the operator to civil and criminal liability. 17 U.S.C. § 506 (1993); 18 U.S.C. § 2319 (1993). InterMedia submits that copyright costs should be treated as external to the benchmark since the operator has no say in the valuation of copyright payments, and faces prosecution if it fails to make such payments.

Additionally, because of the new mandatory signal carriage requirements, InterMedia must pay copyright fees. The carriage of a single broadcast signal requires payment of the compulsory copyright fee. All operators must provide a basic service tier as a prerequisite to any cable service, and the basic tier must include any local television stations carried pursuant to must-carry and/or retransmission consent. Even if all eligible commercial must-carry stations in the operator's service area opts for retransmission consent and are not carried on the system, the carriage of non-commercial educational stations is mandatory triggering copyright liability. Thus, because there is no way for a cable system to avoid copyright payments, costs associated with copyright are no different from other taxes and should be external to the benchmark.

The copyright fee is also a tax on the transaction between the cable operator and subscriber because the amount of copyright payment is based solely on the operator's gross receipts. 17 U.S.C. § 111(d) (1993). As such, copyright fees may be itemized pursuant to Section 622(c)(3) of the Act.[7] In contrast, the fee for carriage of all other programming services carried on InterMedia's systems are based on the number of subscribers, and not on gross receipts. Should the Copyright Royalty Tribunal raise the compulsory copyright fees, operators will be forced to absorb this cost within the current benchmark rate. Consequently, these federally-mandated copyright fees cannot be equated with voluntarily negotiated programming costs.

requests that the Commission allow operators to treat copyright fees as costs external to the benchmark.

IV. Conclusion

Based on the foregoing, InterMedia respectfully requests that the Commission modify its Report & Order as discussed herein.

Respectfully submitted,

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I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 21st day of June, 1993, served by first-class mail, postage pre-paid or hand delivery, a copy of the foregoing "Petition for Reconsideration" to:

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